92-8894

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF NEBRASKA Plaintiff/Appellee v. CLARENCE VICTOR Defendant/Appellant	)	Case No. ORIGINAL **Motion to Appeal in Forma Pauperis**

COMES NOW the Defendant/Appellant, Clarence Victor, and pursuant to Rule 39 of the Federal Rules of Appellate Procedure, moves for leave to appeal in forma pauperis. A poverty affidavit of the Defendant is attached hereto as Exhibit "A" and incorporated herein by this reference.

Dated this 20 day of May, 1993.

x Clarence Victor
Clarence Victor, Defendant/Appellant
Nebraska State Penitentiary
Lincoln, Nebraska

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SUPREME COURT, U.S.

Certificate of Service

The undersigned certifies that a copy of the foregoing Motion to Proceed In Forma Pauperis was served by Certified Mail, Return Receipt Requested, on

Donald Stenberg
Attorney General
2115 State Capitol
Lincoln NE 68508

J. Kirk Brown
Assistant Attorney General
2115 State Capitol
Lincoln NE 68508

on the 28 day of May, 1993.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF NEBRASKA	)	Case No. _____
	)	
Plaintiff/Appellee	)	
	)	
v.	)	
	)	**Affidavit In Forma Pauperis**
CLARENCE VICTOR	)	**(Exhibit "A")**
	)	
Defendant/Appellant	)	

State of Nebraska)
) ss.
County of Lancaster)

I, Clarence Victor, being first duly sworn, depose and say that I am

and in support of my Motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, but I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1. The trial court erred in failing to grant petitioner an evidentiary hearing as required by law concerning petitioner's petition for post conviction relief.

2. Counsel for defendant failed to provide effective assistance of counsel in several areas, both at trial and on appeal, each of which constituted ineffective assistance of counsel on its own.

3. The Nebraska Supreme Court erred in failing to reverse the trial court in refusing to retroactively apply Cage v. Louisiana.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. **Are you presently employed?**

   No.

   a. **If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.**

      Not applicable.

   b. **If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you receive.**

      1987. I MADE $150.00 PER WEEK AS A GENERAL LABORER.

2. Have you received within the past twelve months any income from a business, profession or other form of self employment, or in the form of rent payments, interest, dividends or other source?

   No.

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

      Not applicable.

3. Do you own any cash or checking or savings accounts?

   No.

   a. If the answer is yes, state the total value of the items owned.

   Not applicable.

4. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

   a. If the answer is yes, describe the property and state its approximate value.

      Not applicable.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No one is dependent upon me for support.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties of perjury.

Clarence Victor

Subscribed and sworn to before me this 20 day of May, 1993.

Notary Public

GENERAL NOTARY-State of Nebraska
MARK A. WEBER
My Comm. Exp. Febr. 10, 1996

Let the Appellant proceed without prepayment of costs or fees or the necessity of giving security therefore.

By the Court

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Finally, this Court can readily see that the Nebraska Supreme Court failed to apply the proper standard of retroactivity with respect to this Court's decision in Cage v. Louisiana, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The Nebraska Supreme Court attempted once again to skirt the issue by indicating that they had resolved the Cage problem by virtue of their decision in State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991). With all due respect to the Supreme Court of the State of Nebraska, not only was their rationale incorrect, but an attempt by that Court to pass muster upon a United States Constitutional issue interpreted by the Supreme Court of the United States should have absolutely no precedental value within the State of Nebraska.

WHEREFORE, in view of the fact that the decision of the Supreme Court of the State of Nebraska deprived the Petitioner of Constitutional guarantees of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Petitioner respectfully requests this Court issue a Writ of Certiorari.

CLARENCE VICTOR, Petitioner

By

Mark A. Weber (#18666)
J. Joseph McQuillan (#12775)
WALENTINE, O'TOOLE,
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Omaha NE 68154
(402) 330-6300

Court Appointed Counsel for Petitioner

No. 92-8804

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

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CLARENCE VICTOR,

PETITIONER,

vs.

STATE OF NEBRASKA,

RESPONDENT.

- - - - - - - - - - - 0 - - - - - - - - - - -

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEBRASKA

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT AN INDIGENT, ILLITERATE PETITIONER AN ATTORNEY TO PROPERLY RAISE ISSUES AND AN EVIDENTIARY HEARING AS REQUIRED BY LAW CONCERNING PETITIONER'S PETITION FOR POST CONVICTION RELIEF, CONTRARY TO THE UNITED STATES CONSTITUTION AND FEDERAL LAW.

II. WHETHER COUNSEL FOR DEFENDANT FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL IN SEVERAL AREAS, BOTH AT TRIAL AND ON APPEAL, EACH OF WHICH CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL ON ITS OWN.

III. WHETHER THE NEBRASKA SUPREME COURT ERRED IN FAILING TO REVERSE THE TRIAL COURT'S REFUSAL TO RETROACTIVELY APPLY CAGE v. LOUISIANA.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

CLARENCE VICTOR,

PETITIONER,

vs.

STATE OF NEBRASKA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEBRASKA

The Petitioner prays that the Writ of Certiorari be issued to review the judgment of the Supreme Court of Nebraska, entered January 29, 1993, and on which rehearing was denied March 10, 1993.

The opinion of the Supreme Court of Nebraska, No. S-91-933, dated January 29, 1993, is attached as Appendix A.

The letter of the Clerk of the Nebraska Supreme Court and Nebraska Court of Appeals, dated March 10, 1993, overruling Petitioner's Motion for Rehearing is attached as Appendix B.

The Order of the District Court of Douglas County, Nebraska, dated September 17, 1991, is attached as Appendix C.

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The jurisdiction of the Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America.

2. This case involves the following provisions of State Law:

Nebraska Revised Statutes, §29-2520
Nebraska Revised Statutes, §29-2521.03
Nebraska Revised Statutes, §29-2523
Nebraska Revised Statutes, §29-3001

Nebraska Constitution, Article I, Section 3
Nebraska Constitution, Article I, Section 9
Nebraska Constitution, Article I, Section 12
Nebraska Constitution, Article I, Section 13

The text of the Nebraska Statutes is set forth in Appendix D.

The text of Nebraska Constitution provisions of set forth in Appendix E.

The Nebraska Supreme Court Advisory Committee Opinion is set forth in Appendix F.

STATEMENT OF THE CASE

Victor was originally charged and convicted by a jury of Murder in the First Degree and use of a weapon to commit a felony. He is currently under a sentence of death for the offense of Murder in the First Degree and a consecutive sentence of 20 years imprisonment for the offense of Use of a Weapon to Commit a Felony. His conviction and sentence were the subject of a direct appeal to the Nebraska Supreme Court where said conviction and sentence was affirmed. State v. Victor, 235 Neb. 770, 457 N.W.2d 431 (1990). Subsequently, Defendant filed his Petition for Writ of Certiorari to the Supreme Court of the United States of America. Defendant's Petition was denied _____S.Ct. _____ (1991) (Supreme Court Case No. 90-6259)

The facts of the case are as follows:

At approximately 6:00 p.m. on Saturday, December 26, 1987, Omaha Police were dispatched to 2125 Ohio Street. Upon arrival, the police officers entered the residence and found the deceased, Alice Singleton, lying on the floor in the kitchen area. The deceased had lacerations to the neck among other injuries, and it was later determined that these lacerations were the major contributing factor to her death.

The police investigation revealed that an individual named Clarence Victor had previously done gardening work for the deceased. In checking his record, police determined that Victor had been convicted of two previous homicides.

In the canvas of the neighborhood, police learned from a neighbor that an older model cream-colored four-door automobile was parked west of Mrs. Singleton's residence at approximately 5:00 p.m. on December 26, 1987. A black male described only as between the ages of 30 and 40, wearing sunglasses and a hat, was observed seated behind the steering wheel of the car.

On December 29, 1987, Omaha Police Officer Timothy Conahan had located the residence of Mr. Victor and observed Victor's vehicle parked in the area.

Mr. Victor's vehicle is described as a larger, older model four-door vehicle, gold in color.

The neighbor who had observed the suspicious vehicle near the Decedent's house was retrieved by the police and given the opportunity to observe Mr. Victor's vehicle. The witness stated that Victor's vehicle was similar to the one she had seen, but could not positively identify it as being the same vehicle.

The police determined that Mr. Victor should be questioned, but he officers believed they did not have sufficient probable cause to obtain an arrest warrant for him at this point. Lieutenant Larry Roberts, commanding officer of the Omaha Police Division Homicide Unit, directed plainclothes officers Conahan and Pitmon Foxall to keep Victor's residence under surveillance. The officers were instructed not to attempt to enter the residence of the Defendant, but rather to wait for him to exit the residence and enter the vehicle. Once in his vehicle, officers were instructed to stop the vehicle and make contact with Mr. Victor.

After having kept the vehicle under surveillance for an hour and a quarter, a black male entered the vehicle and proceeded north on 25th Avenue. Both Officer Foxall and Officer Conahan, in separate unmarked vehicles, followed the suspect's vehicle. After traveling a few blocks, the officers made contact with a uniformed officer in a marked cruiser and directed that officer to stop the suspect's vehicle.

The cruiser officer obtained the license and registration from the driver of the vehicle and turned it over to Officer Foxall. The driver, now identified as Clarence Victor, was informed by Officer Foxall that an investigation was being conducted and that they would like Victor to accompany them to the police station. Mr. Victor complied and he was transported in Officer Foxall's unmarked cruiser car to the police station. Victor's vehicle remained in the parking lot where it had been stopped.

Victor was brought to the fourth floor of the Omaha Police Station and was questioned about his whereabouts on December 25 and 26, 1987, the date of the homicide. Victor was not advised of his Miranda rights nor was he informed in any fashion that he was or was not under arrest.

Victor was questioned by Officers Conahan and Foxall concerning the death of Mrs. Singleton and Victor gave them an exculpatory statement indicating that he had not been near the residence of the deceased on that date.

The police officers then requested that Victor execute a consent to search form for the search of his residence at 2344

Manderson Street in Omaha, Nebraska, and also for his automobile. Victor agreed to do so. Upon request of the police officers, Victor also agreed to provide hair samples and fingernail scrapings.

Victor was then transported by Officers Conahan and Foxall to his residence for purposes of conducting the search. Contemporaneously with the search of his residence, Victor's brother-in-law, Fred Walker, was interviewed by one of the police officers. Mr. Walker was specifically asked about Victor's whereabouts on December 26, 1987, and in the officer's opinion Walker's responses were inconsistent with those previously given by Victor.

After the residence search, Victor was returned by the police officers to the Central Police Headquarters. At that time, he was informed of the apparent inconsistencies in his story as compared with that of his brother-in-law. In addition, he was advised of his Miranda rights and asked to explain the inconsistencies. Victor answered yes to all questions on the rights advisory form and for a time continued to deny involvement in the homicide.

Officer Foxall then called Mr. Victor's attention to a previous homicide for which he had been convicted in 1964. Officer Foxall testified: "I specifically told Mr. Victor that when my father had investigated that homicide, he didn't lie to my father and that he didn't have to lie to me. And that's when Mr. Victor, at that point told me that he had been at the Singleton residence. He said that he had knocked on the door, she answered, there had

been some argument by Mrs. Singleton, "at which time he struck her."

Mr. Victor then agreed to give a taped statement concerning his involvement with the homicide of Mrs. Singleton. At the trial, his taped statement was marked as Exhibit 28 and received into evidence over Victor's objection.

In his taped statement, Victor acknowledged that he went to Mrs. Singleton's home on December 26, 1987, and knocked on the door. After opening the door, she began to scream and began to swing her hand and scratched the Defendant. The Defendant stated he struck her then with his hand and knocked her down and then struck her in the head with a pipe. He claimed that Mrs. Singleton, while on the ground, got tangled in some type of cord and he used his pocket knife to cut the cord loose from her throat. Victor indicated that he had left Mrs. Singleton's residence and returned home.

When asked by Officer Foxall why he killed Mrs. Singleton, the Defendant responded that he drank too much.

At trial, Dr. Blain Roffman, a pathologist, testified that he performed an autopsy on the body of Alice Singleton. He testified that he observed a contusion above the right eyebrow and on the right cheek area and some discoloration around the right orbital area. He also observed bruising on the left eye and a contusion and bruise to the left ear.

Dr. Roffman further testified that he observed five lacerations to the neck and throat area, three of which penetrated

deeply into the skin, including one which penetrated down to the level of the adams apple.

Mrs. Singleton also suffered fractures of the fourth through ninth ribs on the right side and second through ninth ribs on the left side.

Dr. Roffman opined that the head injuries were caused by blunt trauma. He would only estimate that the trauma was caused by several blows to the head. Finally, the cause of death was attributed to a laceration of a branch of the left carotid artery with subsequent hemorrhaging.

The jury returned a verdict of guilty of Murder in the First Degree.

Pursuant to Neb. Rev. Stat. §29-2520 (Reissue 1985), a sentencing hearing was held before a three judge panel on August 26, 1988. At the sentencing hearing, the Court received into evidence a complete transcript of the testimony adduced at trial and all items received into evidence at the trial. The sentencing panel also received into evidence Exhibits 29, 30, 31, 32 and 33. Exhibit 29 was a certified copy of the judgment and sentence in State v. Clarence Victor, Doc. 95, No. 308, in the District Court of Douglas County, Nebraska, showing Victor's conviction of Murder in the Second Degree in 1976. Exhibit 30 consisted of a certified copy of the record of State v. Clarence Victor, Doc. 70, No. 304, in the District Court of Douglas County, Nebraska, evidencing Defendant's conviction of the crime of manslaughter. Also a portion of Omaha Police Division report was included relating to

the Defendant's charge and conviction of manslaughter as evidenced by Exhibit 30. Exhibits 32 and 33 consisted of copies of records of the State Department of Correctional Services relating to the Defendant while he was incarcerated in the Nebraska Penal and Correctional Complex on previous occasions.

The Sentencing Panel sentenced the Defendant to death.

In support of their finding, they determined that the State had proven beyond a reasonable doubt that the Defendant was previously convicted of another murder or a crime involving the use or the threat of violence to the person or has a substantial history of serious assaultive or terrorizing criminal activity, which is aggravating circumstance (1)(a) §29-2523 Neb. Rev. Stat. To support the existence of aggravating circumstances (1)(a), the Court relied on the conviction for Second Degree Murder and the police reports in the 1964 manslaughter conviction.

The Court also found that Neb. Rev. Stat. §29-2523 (1)(d) also was proven by the State beyond a reasonable doubt. §29-2523 (1)(d) reads: "The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence." In making their finding they separated the section into two prongs. The Court specifically found that prong one, that is, that the murder was especially heinous, atrocious, cruel ". . . was proven beyond a reasonable doubt."

In support of this finding, the Court stated:

> The panel finds from the evidence beyond a reasonable doubt that the murder of Alice Singleton was especially heinous, atrocious, and cruel in that she was subjected to the imposition of extreme suffering by the Defendant

prior to her death, all as demonstrated by the nature of the injuries described above, the manner of their infliction, and her being alive and conscious during most if not all of the assault. Therefore,the panel finds that this prong of the aggravating circumstances exists beyond a reasonable doubt.

As to the second prong " . . . manifested exceptional depravity by ordinary standards of morality and intelligence . . . " of §29-2523 (1)(d) the Court found there was insufficient evidence to prove its existence beyond a reasonable doubt.

The Sentencing Panel found that none of the statutory mitigating circumstances as set out in Neb. Rev. Stat. §29-2523(2)(a-g), were present. However, the sentencing panel did find that the Defendant's exemplary prison record compiled on prior incarcerations was a mitigating circumstance.

Nonetheless, the Court found that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases.

Victor filed a Motion for Post-Conviction Relief with the Douglas County District Court pursuant to Neb. Rev. Stat. §29-3001 (et seq.) (Reissue 1989). Said Motion was filed on or about May 10, 1991.

Additionally, Victor requested leave to proceed In Forma Pauperis and for appointment of counsel concerning Appellant's Post-Conviction Relief Appeal.

Without hearing on the matter, the Court denied Defendant's Motion for Appointment of Counsel and that he be granted an evidentiary hearing and found further that the Post-Conviction Petition be overruled. It should be mentioned that at all times

during these proceedings, until the appointment of Court-Appointed Counsel in or about November of 1991, that Appellant was Pro Se.

Following the District Court's denial of Defendant's "Pro Se" Motion to vacate sentence under Neb. Rev. Stat. §29-3001, et seq. (Reissue 1989), The Nebraska Post-Conviction Act, Defendant timely perfected his appeal to the Nebraska Supreme Court. At that point Defendant was, for the first time, afforded Court-Appointed Counsel.

The issues tried in the Court below were as follows:

1. That Victor was denied due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the Nebraska Constitution in that the trial court improperly instructed the jury on the law with regard to the concept of "Reasonable Doubt."

2. That the reweighing process of aggravating and mitigating circumstances engaged in by the Nebraska Supreme court violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3, 9 and 13 of the Constitution of the State of Nebraska.

3. The death penalty imposed upon Victor was done in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 3 and 12 of the Nebraska Constitution in that the sentencing panel relied upon aggravating circumstances (1)(d) of §29-2523 (Neb. Rev. Stat.) 1943, which Section is unconstitutionally vague and results in an arbitrary imposition of capital punishment.

4. That the sentencing panel and Nebraska Supreme Court refused to follow the United States Supreme Court's holding in Lockett v. Ohio, 438 U.S. 586 (1978), requiring consideration of all mitigating factors whether Statutory of otherwise. Thus by deciding that aggravating circumstances §29-2523 (2)(g) did not exist and totally refusing to consider the Defendant's inability to conform his conduct to law because of mental defect or intoxication, the Defendant's rights under the Eighth and Fourteenth Amendment to the United States Constitution were violated.

5. That the death penalty imposed upon the Defendant was in violation of Neb. Rev. Stat. §29-2521.03 in that neither the sentencing panel nor the Supreme Court followed the requirement of comparing the facts of the Defendant's case with other "criminal homicides" with the same or similar circumstances to determine the proportionality with the Defendant's sentence with the results of similar cases in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States.

6. That the sentencing panel erred by admitting into evidence at the sentencing hearing Victor's confession to a 1964 homicide which resulted in a Manslaughter conviction. That absent this confession, there was no evidence of support considering the incident for purposes of §29-2523 (1)(a) Neb. Rev. Stat. That the confession did not conform to the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), in that the evidence was uncontroverted that the police did not apprise Victor of his Fifth and Sixth Amendments rights under the United States Constitution. That the use of this statement to prove an aggravating circumstance was erroneous and a violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 12 of the Constitution of the State of Nebraska.

7. That the Defendant's confession was obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that it was not voluntary, it was the product of an unlawful arrest and was obtained without a valid waiver of his so-called "Miranda Rights."

8. The trial and appellate counsel was ineffective in failing to raise or improperly raising each of the aforementioned issues in violation of the Defendant's Sixth Amendment right to effective assistance of counsel.

The trial court in its Order of September 17, 1991 (Appendix C) overruling Victor's Motion to Vacate Sentence and Conviction, first of all refused to retroactively apply Cage v. Louisiana, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed. 2d 339 (1990). The Court argued that "[t]he decision in Cage was rendered after Defendant's conviction and affirmance of such conviction on appeal to the Nebraska Supreme Court. Cage does not indicate if its effect is

retroactive. The Court determines that it should not be applied retroactively." (Citations omitted). The balance of Victor's constitutional arguments were summarily overruled. See Appendix C.

Further, with respect to ineffective assistance of counsel, the trial court determined as a matter of law, " . . . that each of the aforementioned contentions either were raised on appeal to the Nebraska Supreme Court or the contention arose after his [Victor's] trial and final judgment by the Nebraska Supreme Court. Defendant's claim that his contentions were improperly raised on appeal constitutes a conclusion unsupported by any allegations of specific facts in that regard." Finally, the Court concluded that " . . . having reviewed lower court's motion and the files and records of this case, the Court finds that no evidentiary hearing is required and that Defendant's Motion should be overruled." (Appendix C).

Counsel was thereafter appointed to represent Victor on appeal. He was forced to appeal without properly amending pleadings or creating a proper record. The Constitutional deficiencies noted above were raised, briefed and argued before the Nebraska Supreme Court. In its opinion dated January 29, 1993 (Appendix A), the Nebraska Supreme Court held in summary that "finding no merit in the Assignments of Error properly before this Court, we affirm the decision of the District Court in its entirety." The Nebraska Supreme Court held that an evidentiary hearing was unnecessary because the Court alleged that Victor

> " . . . failed to advance, either in the Motion before the District Court or in the present appeal to this

Court, allegations of specific facts to support these bare conclusions. Since the Defendant failed to make a factual showing to indicate he was entitled to relief, the District Court did not err in denying Defendant an evidentiary hearing on these previously litigated issues."

With respect to the issue of retroactivity concerning the United States Supreme Court's decision in Cage v. Louisiana, the Nebraska Supreme Court held that it had upheld the Constitutionality of the reasonable doubt language of the Nebraska Jury Instruction. It found the language distinguishable from that found unconstitutional by the United States Supreme Court in Cage, citing its own Nebraska Supreme Court decision in State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991).

Following the Supreme Court's affirmance of the District Court on January 29, 1993, Victor thereafter timely filed his Motion for Rehearing. On March 10, 1993, the Nebraska Supreme Court overruled Victor's Motion for Rehearing. Accordingly, Victor properly perfects his appeal to this Court.

REASONS FOR GRANTING WRIT

I.

THE TRIAL COURT ERRED IN FAILING TO GRANT AN INDIGENT, ILLITERATE PETITIONER AN ATTORNEY TO PROPERLY RAISE ISSUES AND AN EVIDENTIARY HEARING AS REQUIRED BY LAW CONCERNING PETITIONER'S PETITION FOR POST CONVICTION RELIEF CONTRARY TO THE UNITED STATES CONSTITUTION AND FEDERAL LAW.

The Nebraska Supreme Court failed to reconcile its prior decisions with the decisions of United States Supreme Court as well as those from the United States District Court for the District of Nebraska with respect to the appointment of counsel for Victor and allowing Victor an evidentiary hearing on his Post-Conviction Petition.

The Nebraska Post Conviction Act, §29-3001, et seq. (Reissue 1989) requires that an evidentiary hearing on a proper Motion containing factual allegations, which, if proven, constitute a violation or infringement of a Constitutional right. State v. Maleck, 219 Neb 680, 365 N.W.2d 475 (1985). In this case, both the Nebraska Supreme Court and the trial court summarily overruled Defendant's Motion for Post-Conviction Relief. The trial court held as follows on this issue:

> Defendant has filed a Motion to vacate sentence and conviction pursuant to §29-3001, R.R.S. 1943, the Nebraska Post Conviction Act. Having reviewed Defendant's Motion and the files and records of this case, the Court finds that no evidentiary hearing is required and that Defendant's Motion should be overruled."

Appendix C.

The Nebraska Supreme Court also summarily dismissed this issue holding that the Petitioner failed to establish a basis of relief.

Yet the Petitioner, sentenced to die, was not afforded counsel to properly raise and preserve issues on his behalf. It must be kept in mind that Petitioner is illiterate.

The Nebraska Supreme Court has held that a hearing is usually advisable to avoid protracted litigation and if the facts alleged, if true, would justify relief, or when a factual dispute arises as to whether a Constitutional right was denied, an evidentiary hearing must be granted. State v. Scholl, 227 Neb. 572, 419 N.W.2d 137 (1988).

With respect to Victor's assertion of ineffective assistance of counsel, the trial court held that: "Defendant's claim that his contentions were improperly raised on appeal constitutes a conclusion unsupported by any allegations of specific facts in that regard." The trial court's refusal to appoint Victor counsel. The Nebraska Supreme Court in Scholl held that if the record is silent respecting allegations of ineffective assistance of counsel, the District Court is bound to hear Petitioner's evidence. State v. Scholl, 227 Neb. at 576.

As argued on appeal to the Nebraska Supreme Court, the case most directly on point involving an identical issue is the case of Smith v. Dahm, 779 F.Supp. 1045 (D. Neb. 1991). In that case, the Defendant, Keith E. Smith, had filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Nebraska. He intended to appeal, among other things, the District Court's denial of his Motion for appointment of counsel and for an evidentiary hearing concerning Smith's initial post-conviction

appeal. At the District Court level, the Court had refused to appoint Mr. Smith counsel. On direct appeal and following subsequent extensions of brief dates with the Supreme Court, Mr. Smith's appeal was dismissed. Thereafter, Smith filed a Post Conviction action and was again denied appointment of counsel. It should be noted that Smith had made several requests of the Nebraska Supreme Court to appoint counsel, but the Supreme Court denied his requests and deferred the appointment issue to the "appropriate" District Court.

On his Federal appeal, Judge Urbom, from the United States District Court of the District of Nebraska, noted as follows, citing Douglas v. California, 372 U.S. 353 (1963):

> Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

779. F.Supp. at 1046. (Emphasis supplied in original).

In the present case, Victor's one and only appeal concerning his allegation of ineffective assistance of counsel arose under the Nebraska Post-Conviction Act. Victor properly raised ineffective assistance of counsel with his Motion to vacate sentence before District Judge Buckley and additionally requested appointment of counsel and an evidentiary hearing to discuss this and other issues. As noted by Judge Urbom in Smith v. Dahm, Victor should have been afforded an opportunity to inquire into this issue since it was his first opportunity to do so.

The errors of the trial court and of the Nebraska Supreme Court on appeal were compounded by the fact that they ignored

Victor's illiteracy. Victor should have been afforded an opportunity to have Court appointed counsel represent him immediately for purposes of his post-conviction appeal in order to examine the lengthy record, discern appropriate issues, draft the Motion for Post-Conviction Relief and raise appropriate issues attacking his trial and appellate counsel effectiveness in order to properly present issues to the District Court and the Nebraska Supreme Court on appeal. Additionally, Victor was not afforded the opportunity to even argue the Motions he did raise at an evidentiary hearing. These denials and omissions only enhance and underscore the prejudice suffered by Victor in this case.

Perhaps the Supreme Court would determine that the failures as outlined immediately above were somehow due to procedural defects attributable to Appellant. Nevertheless, reference is again made to Smith v. Dahm, 779 F.Supp. 1048 (D. Neb. 1991). In Smith, Judge Urbom noted that United States Magistrate Judge Peister properly recognized the standard when alleged procedural defaults occur.

> In order to excuse these procedural defaults and have this Court consider his claims, Petitioner has the burden of demonstrating "cause" for and "prejudice" from his procedural defaults. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). However, in Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Supreme Court held:
>
> > However, as we also noted in Engle, "[I]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration." 456 U.S. at 135 [102 S.Ct. at 1576]. We remain confident that, for the most part, "Victims of a fundamental miscarriage of justice will meet the cause and prejudice

> > standard." Ibid. But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a Constitutional violation has probably occurred in the conviction of one who is actually innocent, a Federal Habeas Court may grant the writ even in the absence of a showing of cause for the procedural default.
>
> 477 U.S. 495-96, 106 S.Ct. at 2649. The Court went on to explain that the effective assistance of counsel serves as a major safe guard against miscarriages of justice. Allowing the failure of effective assistance of counsel to be "cause" (if properly exhausted) would, in the eyes of the majority, remedy the manifest injustice feared by Justices Stevens and Blackmun, concurring. Id. at 496, 106 S.Ct. at 2649.

Smith v. Dahm, 779 F.Supp. at 1048-49.

Magistrate Peister went on to note in his Memorandum and Order recommending that Judge Urbom grant Habeas relief to Smith that no showing was made that the Petitioner exercised a voluntary, intelligent waiver of his right to counsel and elected to proceed pro se on appeal. Id. at 1049. See Faretta v. California, 422 U.S. 806 (1975); Johnson v. Zerbst, 304 U.S. 458 (1988). Magistrate Peister concluded that Petitioner's lack of counsel on direct appeal violated his due process rights under Douglas v. California, and recommended that the direct appeal should be reinstated so that Petitioner, with appointed counsel, would be able to assert all of the arguments that could have been raised on direct appeal but were not. Id. at 1050.

While the present case does not specifically address the issue analyzed in Smith v. Dahm, Supra, the case is analogous. Indeed, Magistrate Peister was faced with the precise issue of whether his Findings and Recommendations in Smith v. Dahm, would be applicable

in a Post-Conviction setting. Reference is now made to Turner v. Dahm, a matter that was pending in the United States District Court for the District of Nebraska at the time of Victor's Nebraska Supreme Court Appeal. The case was unreported but is Case No. CV 90-L-381. A copy of the Memorandum and Order in Turner v. Dahm is attached hereto as Appendix G.

It should be noted that the precise issue addressed by Victor here concerning appointment of counsel was not appealed by the State of Nebraska in that case.

Counsel submits that the facts in Turner are substantially identical to the facts of the present case. In Turner Petitioner filed a Pro Se Post Conviction Action in the District Court and requested appointment of counsel. On the same day, the District Court denied Petitioner's Motion without hearing and denied the Request for Appointment of Counsel. The denial of Post-Conviction Relief was not appealed to the Nebraska Supreme Court. Thereafter, Petitioner filed his Petition for Habeas Corpus in the United States District Court for the District of Nebraska. In his Habeas Petition, Petitioner raised (inter alia) a Fourth Amendment Due Process claim, alleging that he was denied a fair trial and also ineffective assistance of counsel in various particulars.

Judge Peister went on to perform an extensive analysis of the right to counsel issue in post conviction proceedings.

> I must first determine whether Petitioner has shown sufficient "cause" for his failure to raise these claims [ineffective assistance of counsel]. Petitioner alleges that following his filing of the Motion for Post Conviction Relief, he requested that the State District Court appoint counsel to assist him in the presentation

> of his proceedings. That request for counsel was denied and the Motion for Post Conviction Relief was denied without an evidentiary hearing. The denial of that assistance of counsel in Petitioner's First Post Conviction action was alleged as "cause" for his default and the claims raised herein.
>
> It is generally held that there is no Constitutional right to an attorney in State Post-Conviction actions. Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987). However, one possible exception to the above stated rule can be found in cases where "ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in State Habeas" Coleman v. Thompson, ___ U.S. _____, ____ 59 U.S.L.W. 4789, 4798 (June, 1991), or as are the circumstances here, only in a post-conviction action. As noted by the Court in Coleman, under those circumstances "State collateral review is the first place a prisoner can present [such] a challenge to his conviction." Id. (Emphasis added).
>
> The exception to the rule of Finley and Giarratano arises out of the long established Due Process requirement that an indigent defendant has the right to an attorney on his first appeal as of right. As stated in Coleman:
>
> > Douglas v. California, 372 U.S. 353 (1963), established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in State Court. Evitts v. Lucey, 469 U.S. 387 (1985), held that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. We based our holding in Douglas on that "Equality demanded by the Fourteenth Amendment." 372 U.S. at 358. Recognizing that "[A]bsolute equality is not required" we nonetheless held that "where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Id. at 357 (Emphasis in original).
>
> 59 U.S.L.W. at 4798 (Emphasis in original).
>
> In this case, Petitioner's "one and only appeal," or its equivalent, in which to raise his ineffective assistance of trial and appellate counsel claims (because those claims could not have been raised on direct appeal) was

> a State Post-Conviction Action. Despite his request for counsel in State District Court, that "one and only appeal" was disposed of without the assistance of counsel and without hearing.

Id. at 3-4.

After citing Bounds v. Smith, 430 U.S. 817 (1977), and Douglas v. California, Supra, Magistrate Peister noted that "[I]mplicit in the holdings of those cases is the proposition that an inmate is denied a meaningful "one and only appeal" if he is denied the assistance of counsel in determining what issues he may properly raise, and for Federal Habeas purposes, which issues he must raise, in that first post conviction proceeding. This is precisely the problem in the present case which the Nebraska Supreme Court failed to recognize.

Magistrate Peister went on to recognize the Murray v. Carrier standard, 477 U.S. 478 (1986) standard as noted in the previously cited case of Smith v. Dahm:

> We explained clearly [in Carrier] that "cause" under the cause and prejudice standard test must be something external to the Petitioner, something that cannot fairly be attributed to him:
>
> > "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the Petitioner can show that some objective factor external to the defense impeded counsel's [(or in this case Petitioner's)] efforts to comply with the State Procedural Rule." 477 U.S. at 488.
>
> 59 U.S.L.W. at 4797 (Emphasis in original). In this case the "external" impediment preventing Petitioner from raising his ineffective assistance at trial and/or appellate counsel claims was the District Court's refusal to provide him with counsel in the first State Court proceeding in which those claims could be raised. I conclude, therefore, that under the circumstances the State District Court's denial of Petitioner's right to

> counsel in his first post conviction action is adequate "cause" for his procedural default.

Turner v. Dahm, (CV 90-L-381) Exhibit "G" at Page 5.

Judge Peister found that the further burden is on the Petitioner to show that the default on his ineffective assistance claims resulted in prejudice. Judge Peister noted that the question required analysis of the merits of his ineffective assistance claims, an analysis which could not be undertaken with the record as it stood because the State District Court denied the Petitioner's request for an evidentiary hearing.

Judge Peister concluded that if the Petitioner requested an evidentiary hearing, the District Court must grant it if:

1) The merits of the factual dispute were not resolved in the State hearing;

2) The State factual determination is not fairly supported by the record as a whole;

3) The fact finding procedure employed by the State Court was not adequate to afford a full and fair hearing;

4) There is a substantial allegation of newly discovered evidence;

5) The material facts were not adequately developed at the State Court hearing; or

6) For any reason it appears that the State trier of fact did not afford the Habeas Applicant a full and fair fact hearing.

Turner v. Dahm, CV 90-L-381 at Page 5; citing Warden v. Wyrick, 770 F.2d. 112 (8th Cir. 1985); Townsend v. Sain, 372 U.S. 293 (1963).

Magistrate Peister concluded in Turner that the State District Court did not employ a fact-finding procedure and, therefore, did not resolve any factual issues concerning Petitioner's present

ineffective assistance of counsel claims and accordingly awarded an evidentiary hearing to the Petitioner. Id. (Appendix G).

In this case, the Petitioner, who could barely read or write, was forced to draft a Motion to vacate sentence and conviction under the Nebraska Post Conviction Act raising the issue of ineffective assistance of counsel. Evidence would show that the ineffective assistance of counsel claim raised, together with the other issues, were drafted by the very attorney who represented Defendant at trial and appeal. This created an irreconcilable conflict of interest (See Argument II), Infra. Interestingly, however, the Nebraska Supreme Court refused to address this issue because it claimed the record was incomplete, but at the same time concluding no evidentiary hearing was necessary.

Counsel should have been appointed by the District Court immediately after Victor's direct appeal to provide Victor with new counsel who would then have the opportunity to review and revise Victor's claims for post conviction appeal, especially the claim of ineffective assistance of counsel. Thereafter, Victor should have been granted an evidentiary hearing to properly analyze the issues raised.

With respect to the Turner v. Dahm decision, it is Petitioner's contention that the "one and only appeal" afforded Petitioner as to his ineffective assistance of counsel claims was the Nebraska State Post Conviction action. Furthermore, by denying Petitioner's Request for appointment of counsel, Petitioner's "one and only appeal" was discarded without the assistance of counsel

and without any hearing on the matter. Turner v. Dahm, although involving a Habeas Corpus action, is identical to the problems presented in this case. In citing Douglas v. California, 374 U.S. 353 (1963), and Bounds v. Smith, 430 U.S. 817 (1977), Judge Piester stated:

> Implicit in the holdings of these cases is the proposition that an inmate is denied a meaningful "One and only appeal" if he is denied the assistance of counsel in determining what issues he may properly raise and for Federal Habeas issues, which issues he must raise, in the first post conviction proceeding.

Turner v. Dahm, CV 90-L-381 (1991).

Judge Piester went on to find that by denying court appointed assistance of counsel to properly and adequately raise ineffective assistance of counsel claims, the Petitioner had demonstrated sufficient cause to grant an evidentiary hearing. More importantly Piester noted that he could not determine whether the ineffective assistance claims resulted in any prejudice because the evidentiary hearing was summarily denied by the State Court and therefore an evidentiary hearing had to be held to determine if any prejudice did exist. This is precisely what should happen in this case.

In its opinion the Nebraska Supreme Court refused to address the most significant issue presented on appeal, i.e., the fact that Petitioner was not afforded counsel to properly formulate, raise and preserve legitimate post conviction issues on Petitioner's behalf. Counsel for Petitioner is curious as to why the Nebraska Supreme Court saw fit to afford Petitioner counsel at all in this case when counsel was required to proceed on appeal with the issues raised by Petitioner and the fact that the trial court summarily

overruled Petitioner's Motion to Vacate Sentence without opportunity for an evidentiary hearing.

Under the Nebraska Supreme Court rationale, that Court would deny an indigent and illiterate Defendant court-appointed counsel to commence a proper Post Conviction Action at all. The Nebraska Supreme Court decision in this case effectively blindfolded Petitioner, required him to proceed unaided when he would have had no abilities to either read or write and then by virtue of its opinion criticizes Petitioner because he could not see the pitfalls waiting for him with respect to procedural defects in his Motion for Post Conviction Relief. The failure of the Petitioner in this case to have the ability to articulate, not to mention conceive of the appropriate issues to appeal on Post Conviction, could later be construed to be a procedural bar in a subsequent Federal Habeas Corpus action. This certainly was not the spirit of the Nebraska Post Conviction action and certainly runs afoul of Federal decisions on this particular issue.

To even further magnify the failure of the Nebraska Supreme Court to square its rationale on this issue, counsel will undertake a comparison of that Court's interpretation of Defendant's rights under a State Post Conviction Action versus the rights afforded a Petitioner in a Federal Habeas Corpus Action.

Rule 8 (c) of the rules governing Section 2254 cases [Federal Habeas Corpus] notes that "[T]hese rules do not limit the appointment of counsel under 18 U.S.C. §3006 A at any stage of the case as the interests of justice so requires." Legislative history

behind the above rule notes that Habeas Corpus and similar proceedings often present "serious and complex issues of law and fact" of a sort requiring assistance of counsel. H.R. Rep. #1546, 91st Congress, Sec. Sess. (1970). J. Liebman, Federal Habeas Corpus Practice & Procedure, Vol. 1 at Page 170.

Further, the Legislative history has determined that Federal Courts should make counsel available from the beginning of Habeas Corpus proceedings if the Petition raises a substantial legal issue. Further, the Congressional Report on the provision concerning appointment of counsel states that the Court "should" appoint counsel when "necessary to insure a fair hearing." Id.

Liebman in his analysis of the right to appointment of counsel in Federal cases notes that:

> In conformity with these expressions of Congressional intent, the Courts generally have endorsed the appointment of counsel to represent indigent and legally unsophisticated prisoners in:
>
> 1. Capital cases, given the especially wide range of difficult legal questions raised by Furman v. Georgia and Gregg v. Georgia; The complex bifurcated nature of capitol trials which make special demands on counsel not present in other cases; and the especially stringent requirements of procedural due process and reliability that the Eighth Amendment places on procedures leading to death sentences.
>
> 2. Cases that turn on substantial and complex legal or mixed legal and factual questions (Eg., the fair composition of grand and petit juries, the voluntariness of confessions, and the effective assistance of counsel).
>
> 3. Cases involving mentally or physically impaired Petitioners;
>
> 4. Cases likely to require the assistance of experts, either in framing or in trying the claims.

5. Cases in which "the indigent is in no position to investigate crucial facts" and

6. Cases in which the evidence to be presented is likely to consist of "conflicting testimony" and the truth is more likely to "be exposed where both sides are represented by those trained in the presentation of evidence nd in cross-examination."

Some Courts apply even more liberal appointment of counsel rules assigning attorneys:

7. Cases in which the Petitioner "has a colorable claim, but lacks the capacity to present it" or in which the legal issues are difficult and the Petitioner has not "demonstrated a workable knowledge of the legal process."

8. Cases involving at least one strong legal claim.

9. Analogous cases.

Id. at 170-73 (Citations omitted.) (Emphasis added.)

Counsel for Petitioner will submit that each of the above nine examples of why counsel should be appointed exist in the present case.

The failure of the Nebraska Supreme Court to correct the trial court errors in failing to appoint Petitioner counsel in this case and further to allow Petitioner an evidentiary hearing in which to present a factual basis cannot now be cured absent this Court granting a Writ of Certiorari to the Supreme Court of the State of Nebraska and require that Court to recognize this Court's noted exception to the rule denying counsel in State Post Conviction actions. See, Douglas v. California, 372 U.S. 353 (1963) and its progeny. See also, Coleman v. Thompson, ___ U.S. ___, 59 U S L W 4789, 4798 (June, 1991).

II.

COUNSEL FOR DEFENDANT FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL IN SEVERAL AREAS, BOTH AT TRIAL AND ON APPEAL, EACH OF WHICH CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL ON ITS OWN.

The Nebraska Supreme Court has held that in order to establish a right to post conviction relief based upon a claim of ineffective assistance of counsel, a criminal defendant must prove that his counsel failed to perform as well as a lawyer with ordinary training and skills in the criminal law area, or that he failed to conscientiously protect the client's interests. Petitioner maintains in this case that his counsel at the trial and appellate level, Mr. Thomas Riley, failed to protect his client's interests and failed to perform as well as a lawyer with ordinary training and skill in the criminal law area.

Petitioner maintains that based upon the record, he suffered prejudice in the defense of his case and as a result of counsel's actions and inactions during the proceedings at the trial level, a reversal of this case for a new trial would be warranted as outlined by the prior decisions of this Court. See State v. Broomhall, 227 Neb. 341, 417 N.W.2d 349 (1988); State v. Isikoff, 233 Neb 679, 292 N.W.2d 983 (1986); State v. Hockstein, 216 Neb. 515, 344 N.W.2d 468, Cert. Denied, 469 U.S. 873 (1984).

Concerning the burden to show prejudice, it is well known that the convicted Defendant seeking a reversal of his conviction or sentence for reason that counsel's assistance was deficient, must show a reasonable probability that but for counsel's unprofessional

errors, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Reddick, 230 Neb. 218, 430 N.W.2d 542 (1988); State v. Peary, 223 Neb. 556, 391 N.W.2d 566 (1986); State v. Robinson, 218 Neb. 156, 356 N.W.2d 879 (1984); and State v. Stranghoener, 212 Neb. 203, 322 N.W.2d 407 (1982). Such a burden can be met in this case upon review of the record.

In the case of Strickland v. Washington, 104 S.Ct. 2050 (1984), the United States Supreme Court set out the standard by which effectiveness of counsel should be judged. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of the conviction or death sentence has two components. First, the defendant must show counsel's performance was deficient. This requires showing that the counsel made errors so serious that the counsel was not functioning as the "counsel" guaranteed the Defendant by the Sixth Amendment. Second, the Defendant must show that the deficient performance prejudiced the defense. This requires showing that the counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable.

Indeed, it should be noted that the test formulated by Strickland is not had the Defendant litigated the particular motion would the result of the motion have been a success or failure. Neither is the question, according to Strickland whether the Defendant is innocent or guilty.

Additionally, since the trial court refused to grant an evidentiary hearing or appoint counsel to reformulate appropriate issues on Post-Conviction, Counsel is forced to submit that the record would support a finding of ineffectiveness.

Nevertheless, present counsel did point to some evidence in the record to support the contention that trial and appellate counsel assisted Petitioner in formulating his Motion for Post-Conviction relief. This, in and of itself, constituted an irreconcilable conflict of interest. More importantly, it constituted ineffective assistance of counsel because the acts of counsel effectively destroyed Petitioner's Post Conviction Appeal. The trial court's summary denial of Petitioner's Motion and his request for counsel speaks for itself. So does this Court's holding in Porter:

> The Constitution assures the Defendant effective representation by counsel whether the attorney is one of his choosing or court appointed. Such representation is lacking, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents--as a vigorous advocate having the single aim of acquittal by all means fair and honorable--are hobbled or fettered or restrained by commitments to others. [Citations omitted.]
>
> Of course, such things as this should never happen, and the place to stop it is the professional conscience of the advocate involved. The Court may not countenance it and must, on the contrary, take effective action just as we are certain the careful judge below would have done had the facts been known and/or before the commencement of the criminal trial. But where this has been allowed to occur, either through a callous conscience of the attorney, or ignorance of the true facts by the judge, the trial is not the fair one demanded by the Constitution. And this is true without regard to the presence or absence of any action of a strictly governmental nature which can be ascribed to the prosecution as the transgressing agency or imputed to the

> trial court on traditional notions of error on the Judge's part.

Porter v. United States, 289 F.2d. 461, 463-64 (5th Cir. 1962).

Initially, as noted above, it is defense counsel's job to recognize the existence of a potential conflict of interest, for counsel to alert his client and the Court as to the potential conflict, and to obtain the client's informed consent to counsel's continued representation despite the risks. Once alerted to the potential conflict, or made aware of facts from which is appears that conflicting interests arguably exist, the trial court must conduct an inquiry of the Defendant as to whether the Defendant is aware of the potential risks and knowingly has chosen his counsel's continued representation despite those risks. People v. McDonald, 68 N.Y.2d 1, 505 N.Y.S. 2d 824, 496 N.E.2d 844 (Ct. App. 1986).

In the case before the Court, it is apparent from the records that Tom Riley, counsel for the Petitioner at trial level and direct appeal, was additionally counting on representing Petitioner for his Nebraska Post Conviction Relief Act. It requires mention that despite a question in the record as to the origins of Petitioner's Motion to Vacate Sentence and Conviction under Neb. Rev. Stat. §29-3001, one can readily note that the Defendant's Motion was notarized by Mr. Timothy Burns, Assistant Public Defender.

Because of the unique nature of the governmental protections afforded Defendants under the Nebraska Post-Conviction Act, this was Petitioner's one and only opportunity to attack trial counsel's effectiveness. That this Motion was drafted by the same trial and

appellate counsel merely begs the question of conflict of interest. Again, since there was no evidentiary hearing on this issue, we are not now able to determine whether the Motion was drafted on behalf of the Petitioner after first fully advising him of a potential for conflict, and the effects that a potential conflict could have on the merits of his appeal or subsequent appeals.

Reference is now made to the Nebraska Supreme Court Advisory Committee Opinion No. 90-1. (Attached as Appendix F for the Court's convenience). The Advisory Committee Opinion was requested by Thomas J. Garvey, Sarpy County Public Defender, then counsel on behalf of John Joubert concerning that Defendant's First Degree Murder conviction. Garvey had requested an opinion of the Advisory Committee concerning his ability to serve as Joubert's counsel on appeal when other members of the Public Defender's Office had represented Joubert at trial. Garvey joined the Public Defender's Office shortly after Joubert's direct appeal to the United States Supreme Court and requested the Advisory Opinion prior to representing Joubert on his Post Conviction Appeal. After reviewing these and other facts substantially similar to the case at bar, the Advisory Committee concluded as follows:

> Under the facts presented, a County Public Defender should not represent a Defendant convicted of First Degree Murder and sentenced to death seeking to overturn the conviction and sentence in a Federal Habeas Corpus action where the grounds for relief involve alleged ineffective assistance of another lawyer in the Public Defender's office . . . .

The record in this case does not reflect whether or not the Petitioner was even informed of the potential conflict of interest

with respect to Trial and Appellate counsel's representation of Petitioner concerning his Motion for Post Conviction Relief. Even so, it is apparent that under the circumstances of this case, it was clearly erroneous for trial counsel to continue to represent the Petitioner on Post-Conviction, despite the fact that counsel undoubtedly had Petitioner's best interests in mind.

A Writ of Certiorari should be issued to the Nebraska Supreme Court with directions that new counsel be afforded the Petitioner to properly raise issues on behalf of the Petitioner which were not raised and preserved prior to this time.

III.

THE NEBRASKA SUPREME COURT ERRED IN FAILING TO REVERSE THE TRIAL COURT'S REFUSAL TO RETROACTIVELY APPLY Cage v. LOUISIANA.

The District Court in its Order overruling Appellant's Motion to Vacate Sentence and Conviction limited its discussion to whether Cage v. Louisiana, 498 U.S. ___, 111 St. Ct. 328, 112 L.Ed. 2d 339 (1990), should be retroactively applied. However, retroactivity of Cage is a moot point under State v. Reeves, 244 Neb. 711, 453 N.W.2d 359 (1990). Retroactivity does not become an issue until a conviction has become final and "A conviction is final where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for Petition for Certiorari has lapsed." State v. Reeves, Supra, at 383, Citing Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Therefore, for purposes of retroactivity and finality, Appellant's conviction was not final until the United States Supreme Court denied Certiorari in February of 1991, at least two months after the Cage decision. Thus, it was error for the District Court to hold that the rule in Cage should not be applied to Appellant's case.

The State of Nebraska argued that the Nebraska Supreme Court's decision in State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), disposes of any Constitutional infirmity with respect to the reasonable doubt instruction given at Petitioner's trial. While that Court had attempted to artfully distinguish the Reasonable Doubt Instruction given in Cage with that of the Reasonable Doubt Instruction given in Morley, (The Morley Reasonable Doubt

Instruction is identical to the one given at Victor's trial), Petitioner respectfully contends that the Reasonable Doubt Instruction given at his trial not only confused the jury, but suggested a higher degree of doubt than is required under the Fourteenth Amendment.

In considering jury instructions, an Appellate Court is obligated to consider how reasonable jurors could have understood the charge as a whole. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 328, 112 L.Ed.2d 339 (1990). When using the terms "Reasonable Doubt" and "Substantial Doubt" as equivalents, this in and of itself is confusing and contradictory. In U.S. v. Atkins, 487 F.2d 257 (8th Cir. 1973), the Eighth Circuit Court of Appeals struck down a jury instruction that equated Reasonable Doubt with Substantial Doubt. The Court in Atkins stated that "Proof beyond a reasonable doubt would seem to require a greater evidentiary showing by the Government than proof of guilt beyond a substantial doubt." Id. at 260 (Emphasis added.)

Other courts have criticized an instruction which equates reasonable doubt with substantial doubt. See, e.g., Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); Smith v. Borden Kircher, 718 F.2d 1273 (4th Cir. 1983); See also, U.S. v. Wright, 542 F.2d 975, 988 (7th Cir. 1976) (Courts including substantial doubt language in its reasonable doubt instruction "can reasonably expect a reversal"), Cert. Denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed 790 (1977); U.S. v. Alvero, 470 F.2d 981, 983 (5th Cir. 1972) (Reversal of

conviction based upon Reasonable Doubt Instruction defined as a "Very Substantial Doubt.")

While the use of "Substantial Doubt" language to define Reasonable Doubt in a jury instruction is not in itself reversible error, See, Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978),

> . . . a jury instruction that utilizes substantial doubt language can and will require reversal unless it can be concluded beyond a reasonable doubt that the jury was not misled by the instruction.

Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990); citing Chapman v. California, 386 U.S. 18, 29, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); Holland v. U.S., 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed.150 (1954).

A determination as to whether the jury was misled by the Reasonable Doubt Instruction must be undertaken. As this case involved a First Degree Murder Conviction, it is Petitioner's contention that had a proper Reasonable Doubt Instruction been given (or no instruction at all which attempted to define Reasonable Doubt), there is a reasonable likelihood that the jury could have had a reasonable doubt as to the Appellant's mental state at the time of the killing, and therefore convicted only a charge of Second Degree Murder. Estelle v. McGuire, 112 S.Ct. 475 (1991). State v. Morley, Supra, involved the conviction of attempted burglary. It is true that the Reasonable Doubt Instruction in Morley was identical to the one given at Appellant's trial, however, having reasonable doubt as to attempted burglary can be quite different from a reasonable doubt as to murder. A

conviction of First Degree Murder carries with it the potential for the death sentence, and if a jury is at all confused or misled due to an instruction given by the Court, the ramifications of this confusion in a conviction of attempted burglary versus a conviction of First Degree Murder, are vastly different. Is it not better to err in favor of saving life rather than destroying it, particularly when the potential for confusion is so likely. If the jury believed a substantial doubt was required, as opposed to only a reasonable doubt, then it is inescapable that the Government's burden is reduced while at the same time increasing the Defendant's burden. The result is that the Reasonable Doubt Instruction given at Petitioner's trial was not in accord with the Due Process Clause of the Fourteenth Amendment.

Additionally, Petitioner contends that to equate reasonable doubt in a criminal trial with that of a reasonable doubt ". . . in one of the graver and more important transactions of life. . . " State v. Morley, 239 Neb. 141, 474 N.W.2d 660, 670 (1991), is to equate the balance of one's life and liberty with that of an important personal decision. While the Reasonable Doubt Instruction is couched in terms of causing a reasonable person to "hesitate to act" instead of "willing to act" in one of the "graver and more important transactions of life," Id. it is quite vague as to what is meant by a grave and important transaction in life. Is a grave and important transaction the pulling of life support systems of an injured family member? Is it a decision on whether to have an abortion? Or, is it buying a house or investing for

security at retirement? It is obvious that the personal experiences of one individual, which might be regarded as highly important and involving a grave decision to that individual, are not as highly important to another individual.

In State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), the Nebraska Supreme Court distinguished the language used in the reasonable doubt instruction with that of the language struck down Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). As noted previously, retroactive application of the Cage decision is not at issue. The only question is whether the Nebraska Supreme Court properly interpreted the Cage decision as it applies to Petitioner's case.

It is emphasized that an Appellate Court must undergo consideration to determine whether there exists a "reasonable likelihood" that reasonable jurors could have understood the jury instruction charge as a whole. Estelle v. McGuire, 112 S.Ct. 475, 482 (1991). There is no question that the reasonable doubt instruction given at Petitioner's trial attempted to equate reasonable doubt with "substantial doubt," and that there is a high probability that a reasonable juror believed substantial doubt was required before voting for acquittal or a lesser charge.

The Eighth Circuit has frowned upon jury instructions which attempt to equate reasonable doubt with substantial doubt as the Eighth Circuit, along with several other circuits, believe that substantial doubt language lessens the burden of proof upon the Government. See, U. S. v. Atkins, 487 F.2d 257 (8th Cir. 1973);

Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); U.S. v. Wright, 542 F.2d 975 (7th Cir. 1976).

In addition, the Federal Courts have determined that any jury instruction which,

> . . . utilizes substantial doubt language can and will require reversal unless it can be concluded beyond a reasonable doubt that the jury was not misled by the instruction.
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> Monk v. Zelez, Supra at 890 (Emphasis added), citing, Chapman v. California, 386 U.S. 18, 29, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); Holland v. U.S., 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

Therefore, irregardless of whether the Nebraska Supreme Court whether or not this Court has purportedly distinguished the jury instruction language via the Morley decision, that Court must undertake an analysis to determine whether the jurors were misled at Petitioner's trial by the reasonable doubt instruction and must also conclude beyond a reasonable doubt that the jurors were not misled by this instruction.

This analysis has not been undertaken. There has been no independent determination that the jurors at Petitioner's trial were not misled by the reasonable doubt instruction. The fact remains that if the Appellate Courts in the State of Nebraska were confused as to the instruction and given that the particular instruction used at Petitioner's trial is no longer in use, it certainly is no leap to conclude that there existed a reasonable likelihood that the lay juror would have been confused or misled by the reasonable doubt instruction. Given the gravity of Petitioner's conviction and sentence and the high probability of

confusion among the jurors, the Supreme Court of Nebraska must undertake the above analysis and conclude beyond a reasonable doubt that the jurors were not misled by the instruction given at Petitioner's trial.

CONCLUSION

As noted from the above, the Nebraska Supreme Court decision in this case rendered on January 29, 1993 runs counter to United States Supreme Court decisions as well as decisions from the United States District Court for the District of Nebraska concerning post-conviction proceedings in general and the appointment of counsel and granting of evidentiary hearings in particular. The opinion of the Nebraska Supreme Court fails to justify its rationale with the carved exceptions to the "No Right to Counsel Rule" as outlined in Coleman v. Thompson, ___ U.S. ___, 59 U.S.L.W. 4789 (1991); Douglas v. California, 372 U.S. 353 (1963).

Additionally, sufficient evidence was presented to the Supreme Court on appeal for the Court to have noted that counsel for Petitioner at trial and on direct appeal attempted to assist Petitioner with respect to his Petition for Post Conviction Relief. These actions were tantamount to ineffective assistance of counsel because counsel was not competent to assist in such an appeal and further that in doing so, counsel created an irreparable conflict of interest with the Petitioner and denied Petitioner one of his most important appeals as of right.